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IN THE

# Supreme Court of the United States

October Term, 1966

No. 87

JULIAN BOND, ET AL.,

*Appellants,*

v.

JAMES "SLOPPY" FLOYD, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

## APPELLANTS' REPLY BRIEF

HOWARD MOORE, JR.,
859½ Hunter Street N.W.,
Atlanta, Georgia, 30314,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, New York, 10017,

*Attorneys for Appellants.*

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## APPELLANTS' REPLY BRIEF

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### I

**The refusal to seat Mr. Bond raises justiciable issues.**

A. Appellees argue that the determination of a legislative member's "qualifications" is "[g]enerally" held to be a matter solely within the jurisdiction of the legislature itself (Br. 12).* They recognize that under the principles of *Gomillion* v. *Lightfoot,* 364 U.S. 339, the rule cannot be an absolute one (Br. 14).

Assuming *arguendo* the general rule, it is clear that it does not govern this case. First, the legislature did not

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* "Br." refers to appellees' brief.

find that Mr. Bond failed to meet a qualification specifically set forth in Georgia's constitution. Second, the legislature's action was based upon Mr. Bond's public expressions on national issues protected by the First Amendment and by the due process and privileges and immunities provisions of the Fourteenth Amendment.

No case cited by appellees involved rights of this kind; the principal ones expressly left the way open for the federal protection of such rights.

The opinion in *Taylor and Marshall* v. *Beckham,* 178 U.S. 548, the case principally relied upon by appellees begins with the observation that the state's power over its own elections must be free from external interference "except so far as plainly provided by the Constitution of the United States", *id.* at 571, and that "the cases must necessarily be rare in which the interference of this Court can properly be invoked", *ibid.* This Court then rejected the claim that a legislature's determination of gubernatorial elections had failed to follow statutory procedures and was not supported by the evidence.

The Court disposed of the due process argument by agreeing with the Kentucky Court of Appeals that the right to hold state elective office was not properly protected by the Fourteenth Amendment; and it also held that the enforcement of the guarantee of a republican form of government is the province of the political department. In *Baker* v. *Carr,* 369 U.S. 186, 223, 231, 284, this Court made clear the limited principle upon which *Taylor* rests.

This is emphasized by the Court's approving reference in the *Taylor* and *Baker* opinions to several earlier cases of appropriate federal court jurisdiction over state election cases. One was *Boyd* v. *Thayer,* 143 U.S. 135, where the Court reversed a judgment of the Supreme Court of Nebraska that an elected candidate was ineligible for gubernatorial office because he had not been a United States

citizen for two years preceding his election. "Arrival at this conclusion", said the Court, "involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and jurisdiction to review a decision against such right or privilege necessarily exists in this tribunal", *id.* at 161. So, here, where the right or privilege is that of public expression on national issues.

The second case cited in *Taylor* and in *Baker* was that of *Kennard* v. *Louisiana*, 92 U.S. 480, where the Court reviewed the right to office of a Louisiana Supreme Court justice. Jurisdiction was assumed because of a challenge made to the constitutionality of the relevant Louisiana statute.

The other cases cited by appellees do not change the rule that federal constitutional rights will be protected even in state election cases.

(1) *Walton* v. *House of Representatives of the State of Oklahoma*, 265 U.S. 487, was a suit by the Governor of Oklahoma to enjoin impeachment proceedings allegedly based upon improper motives and before a similarly motivated court of impeachment. This was claimed to be a denial of due process and equal protection.

(2) *Elder* v. *Colorado*, 204 U.S. 85, was an election contest case where "if there had been an assertion of a right, title, privilege or immunity . . . it would have been so frivolous as not to afford a basis of jurisdiction", *id.* at 88, 89.

(3) *Snowden* v. *Hughes*, 321 U.S. 1, did not involve a right or privilege "of national citizenship which alone is protected by the privileges and immunities clause", *id.* at 7. The Court emphasized this absence of a federal constitutional claim by noting that "[t]here is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any inten-

tional or purposeful discrimination between persons or classes", *ibid.*

It thus appears that contrary to appellees' assertion there is no "long standing policy" (Br. 17) against the review of a claim that federal constitutional rights were violated. Such a policy would have been inconsistent with this Court's recent statement that "such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right", *Gomillion v. Lightfoot, supra,* at 347. Indeed, it is expressly disposed of by this Court's conclusion in *Baker* v. *Carr,* 369 U.S. 186, 229:

> "When challenges to state action respecting matters of 'the administration of the affairs of the state and the officers through whom they are conducted' have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim."

B. Appellees further seek to achieve insulation from judicial review by noting the desirability of giving finality to the political department and the problem of satisfactory criteria for a judicial determination, citing *Coleman* v. *Miller,* 307 U.S. 433, 454-55 (Br. 17). As to finality, there cannot properly be a state "power of self protection" (Br. 18) to violate federal constitutional rights. Nothing in *In re Chapman,* 166 U.S. 661, 668, cited by appellees is to the contrary.

There is no lack of "satisfactory criteria" (Br. 18, 19) in determining whether Mr. Bond's public expressions of opinion are federally protected. This is precisely the area of judicial expertise in an infinite variety of situations in which federal constitutional rights are customarily determined and vindicated.

## II

**The House does not have the power to determine that a legislator cannot conscientiously take the oath. Nor was there any basis for such a conclusion in the present case.**

It is not for a legislative majority to decide that the public expressions of opinion establish an absence of "ability to support and uphold the constitution and laws of the United States" (Br. 25).

Such an exercise of power has no standards whatsoever; it conflicts with the precise statement of qualifications in the State Constitution; it imposes disqualification for the exercise of a federal privilege and immunity; and the electorate. It also exercises a restraint upon free speech upon a most critical problem in our national life where the voice of government is always more powerful than that of dissent. See Finman and Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wisc. Law Rev. 632.

Neither directly nor by inference do the cases cited by appellees support their argument. We do not deal here with state employees, *Baggett* v. *Bullitt*, 377 U.S. 360, or even with labor unions seeking the facilities of the National Labor Relations Board, *American Communications Association* v. *Douds*, 339 U.S. 382; but see *United States* v. *Brown*, 381 U.S. 437. The choice of the electorate for public office is not subject to the same managerial or administrative control by government officials.

Beyond this, two distinctions are to be noted: (1) In neither of the cases cited by appellees did the government involved refuse to permit the oath to be taken; the suits were instituted by persons unwilling to take the oath; similarly in *Gerende* v. *Board of Supervisors*, 341 U.S. 56.

(2) There is no indication in the present case of any "disloyal conduct", *Baggett* v. *Bullitt*, *supra* at 379. When this Court referred to "proper measures safeguarding the public service from disloyal conduct", *ibid.*, it was certainly not suggesting that public expressions of opinion fall under that rubric. This is confirmed by the Court's recent decision in *Elfbrandt* v. *Russell*, 384 U.S. 11.

Appellees' suggestion that the Georgia legislature, with its open record of disregard for democratic processes and constitutional rights,* "Seeks the Protection of Democratic Processes for the People" (Br. 26) by disregarding their votes is matched with equal irony by the appellees' attempt to rely upon that great philosopher and political scientist Professor Alexander Meiklejohn. Nothing which Dr. Meiklejohn wrote in the excerpts in appellees' brief or in his important writings elsewhere supports appellees' suggestion that the legislature can reject the votes of the people and decide that an elected member cannot conscientiously take the oath of office.

The decisions cited by the appellees are quite beside the point. What the appellees did here finds no support in criminal prosecutions under the Smith Act, *Dennis* v. *United States*, 341 U.S. 494, or in the state's right to determine the qualifications of its employees or of prospective members of the bar (Br. 41-42). Nor is it fair to infer from the press interviews with Mr. Bond either indecision as to treason (Br. 29) or advocacy of the violation of law by others (Br. 29, 48).

Appellees do not help their argument that the legislature met "substantive due process standards" in January by citing remarks made in August, 1966, by the present head of the Student Non-Violent Coordinating Committee (Br. 48-49, n. 7). The suggestion that an elected legislator

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* See brief *amicus curiae* herein of the National Association for the Advancement of Colored People, pp. 5-19.

must offer "direct evidence in his favor bearing on the issue of his qualifications (Br. 50), *i.e.*, good character as in *Konigsberg* v. *State Bar of California*, 366 U.S. 82, merely bears out the legislative body's unlawful arrogation of the electorate's power and the violation of federally protected rights.

## CONCLUSION

**The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.**

Respectfully submitted,

HOWARD MOORE, JR.,
859½ Hunter Street, N. W.,
Atlanta, Georgia 30314.

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, New York 10017.

*Attorneys for Appellants.*

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